SHAIK MEERA & ANOR. v. REGINA

[A. Cr. J. (Spenser Wilkinson J.) July 26, 1955]
[Penang — Criminal Appeal No. 19 of 1955]

Penal Code, s. 324 — Voluntarily causing hurt by dangerous weapon — Proof that instrument is one which used as a weapon of offence is likely to cause death — Strict proof of exhibits produced in Court — Appeal — Practice.

This was an appeal against the conviction of the appellants on charges of voluntarily causing hurt with dangerous weapons under s. 324 of the Penal Code. There was no evidence in this case that the instruments in question if used as weapons of offence would be likely to have caused death and no attempt was made by the police to have the instruments examined by the chemist or any one else to discover whether they showed any signs of having been used in the fight.

Held: (1) the prosecution had not in this case discharged the burden of proof which lay upon them in regard to the nature of the weapons used and the appellants were entitled to the benefit of the doubt upon this point; (2) on the facts of the case the conviction should be altered from one of causing hurt with a dangerous weapon under s. 324 of the Penal Code to that of causing hurt under s. 323 of the Penal Code.

Obita dictum: Where there is one trial at which more than one person is tried jointly with others there should be but one appeal.

MAGISTRATE'S CRIMINAL APPEAL.

Eusoffe Abdoolcader for the appellants.

D. C. Jackson (Sr. Federal Counsel) for the respondent.

Cur. Adv. Vult.

Spenser Wilkinson J. : — The 1st appellant was charged with voluntarily causing hurt with an iron pipe to one Sakkarai Eawa, contrary to section 324 of the Penal Code and the 2nd appellant was charged with voluntarily causing hurt to one Narayanasamy with an iron rod, contrary to section 324 of the Penal Code. They were separate offences committed by each of the appellants in respect of different complainants; but the injuries having been inflicted during one and the same fight the appellants were quite properly tried jointly. Although, however, there was but one trial separate appeals were filed with separate copies of the same record and separate grounds of decision.

When the appeals came on for hearing I drew attention to this and consolidated the two appeals into one appeal under the present heading. In my opinion where there is one trial at which more than one person is tried jointly with others there should be but one appeal. The fact that there are several case numbers in the Court below should not be allowed to involve the extra time and costs involved in typing the additional copies of the record and in preparing separate grounds of decision. It may be that in this particular instance the cases of the two appellants became separated by reason of the fact that each of them made an application to the High Court for bail. However this may be, it is in my opinion the better practice to have one appeal in respect of one trial, although there may be several appellants.

The grounds of appeal of each of the appellants which were very numerous, were identical, except in regard to the references to the iron pipe or the iron rod respectively. Most of these grounds amounted to questions of fact and in my opinion on the principal issue involved in the case — viz. whether the appellants in fact inflicted hurt upon the complainants — there was ample evidence upon which the learned Magistrate could find as he did.

It was suggested in the course of the argument that the learned Magistrate had misdirected himself on the question of the burden of proof. In my opinion it is abundantly clear from his grounds of decision, in which the learned Magistrate has, as clearly and accurately as it is possible to imagine, set out the law on this subject, that there was no misdirection of any kind on this point.

The only point of difficulty in the case was the question of the instruments used. The fight which gave rise to the prosecution took place on the 13th March, 1955. A search of the premises by the Police on the same evening, albeit perhaps a rather hurried one, revealed no weapons of any kind. The complainant Narayanasamy stated that when he returned from hospital on the 16th March he found the two exhibits, P. 1 and P. 2 outside his room and that he handed them over to the Police on the 18th March. The Police having obtained possession of these weapons took no steps to have them examined by the Chemist or anyone else to discover whether they showed any signs of having been used in the fight. I think it very probable that the instruments actually used would have shown traces of blood or human hair in view of the fact that both complainants received lacerated wounds on the scalp. A further point about the exhibits is that they are both very heavy instruments and it seems surprising to me that if the exhibits in Court were the instruments actually used in the fight the injuries inflicted were not much more severe. Unfortunately the Medical Officer who gave evidence, although he expressed the opinion that the injuries could have been caused by the exhibits, was never asked any question on the subject of whether these instruments if used as weapons of offence would be likely to cause death. It is quite clear that the instruments in fact used did not put either of the complainants in danger of their lives.

Both complainants had stated in their first reports that they did not know what they had been hit with, but both gave positive evidence that it was the exhibits that had been used. I do not think they were

deliberately lying on this point but I think they had jumped to conclusions from the finding of P. 1 and P. 2 on the premises.

Another point regarding these instruments is that the charges were amended altogether three times in the course of the proceedings, one of the amendments having the effect of reversing the instruments as originally charged i.e. the appellant who was originally charged with using an iron pipe was ultimately charged with using an iron bar and *vice versa*. It appears, therefore, that the prosecution were not very clear in their minds on the subject of what instruments were used.

Counsel for the appellants pointed out that even the charges as finally amended by the learned Magistrate did not properly follow the wording of section 324 of the Penal Code. The wording actually used in the finally amended charges was :—

"Voluntarily caused hurt to . . . . . by means of a weapon of offence to wit, an iron rod/bar an instrument likely to cause death."

The proper wording would, of course, be :—

"An instrument. to wit an iron rod/bar, which, used as weapon of offence, was likely to cause death".

Both appellants were represented in the Court below but Counsel for the defence does not appear to have drawn that attention of the learned Magistrate to this defect in the amended charge and one of the grounds of appeal was that the charges as finally framed disclosed no offence known to the law. I am quite satisfied that the charges as finally framed gave the appellants ample notice of what they were charged with and that the slight defect in the wording in no way prejudiced either of the appellants. Nevertheless, I cannot help feeling that the wording used by the learned Magistrate in the final charges indicates that his attention was never properly directed to the precise nature of what has to be proved under section 324 when the weapon used is not an instrument for shooting, stabbing or cutting. There are some implements about which one can say simply by looking at them or handling them that, used as weapons of offence, they are likely to cause death; sometimes evidence on the point is desirable; but on a charge under section 324 there ought to be a specific finding in regard to this matter.

There are certain parts of a prosecution case which, as a matter of practice, the Courts always expect to be proved as strictly as possible and one of these is proof that an exhibit produced in Court is the very thing which was found or used on the scene and that it has not been tampered with in the meantime. After hearing the arguments on appeal I came to the conclusion that the prosecution had not in this case discharged the burden of proof which lay upon them in regard to the nature of the weapons used and that the appellants were, therefore, entitled to the benefit of the doubt upon this point.

Mr. Abdoolcader contended on behalf of the appellants that any doubt I might have as to the instruments used should go to the whole of the prosecution case and that the appellants should be acquitted. I was unable to accept this contention, however, as I think it is abundantly clear from the evidence and the facts found by the learned Magistrate that the appellants inflicted the wounds described by the Medical Officer upon these complainants. Whatever implements may have been used for the purpose there is no doubt that this hurt was inflicted voluntarily by the appellants. I therefore altered the conviction from one under section 324 to one under section 323 of the Penal Code. I did not consider the sentence of six months' imprisonment imposed by the learned Magistrate was excessive under section 324, but having reduced the charge I felt bound to reduce the sentence. The learned Deputy Public Prosecutor indicated that upon a charge under section 323 the imprisonment already undergone by the appellants appeared to him to be sufficient provided they were also bound over. I, therefore, altered the sentence to one of five weeks' imprisonment in the case of each appellant and also bound them over in the sum of $250 for a period of six months with one surety each to keep the peace.

Order accordingly.

Solicitors for the appellant: *Ong Huck Lim & Co.*

PUBLIC PROSECUTOR v. SUNDRAM (f)

[A. Cr. J. (Buhagiar J.) July 28, 1955]

[K. L. — Selangor Criminal Appeal No. 54 of 1955]

Road Traffic — Motor Vehicles Commercial Use Regulations, 1945, reg. 7 — Using a motor vehicle in contravention of the Haulage Permit — Excess of weight — Whether mens rea need be proved — Proof of Haulage Permit.

In this case the respondent was the registered owner of a motor lorry, the permissible laden weight of which was 8 tons. On January 10, 1955, an employee of the respondent was in charge of the said lorry and the load on the said lorry was found to be in excess of the permissible weight by over 2 tons. At the time the haulage permit was not proved but evidence as to the permissible laden weight was given by a Registration clerk. The learned Magistrate held that it had not been proved that the respondent had knowledge of the excess weight and was not responsible for the act of the servant.